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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC BUFORD et al.,

Defendants and Appellants.

B211186

(Los Angeles County  
Super. Ct. No. MA032463)

APPEALS from the judgments of the Superior Court of Los Angeles County.  
George G. Lomeli, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant Isaac Buford.

Neil Rosenbaum, under appointment by the Court of Appeal, for Defendant and Appellant Charles E. Ward.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellants Isaac Buford and Charles E. Ward appeal from the judgments entered after a jury convicted them of count 1, second degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup> and count 2, second degree robbery (§ 211). Appellants were sentenced to state prison as follows: count 1, 15 years to life and count 2, three years to be served consecutively to count 1. We affirm.

### **CONTENTIONS**

Buford contends that: (1) the admission of Desiree Thompson's testimony violated his due process rights; (2) his rights to compulsory process and due process were violated when deputy sheriffs released a witness from custody; (3) the trial court erred by denying his new trial motion; and (4) his right to due process was violated by cumulative error. He joins in Ward's arguments.

Ward contends that: (1) his rights to compulsory process and due process were violated when the trial court refused to order the prosecution to help the defense find a witness, refused to let defense counsel play the tape recorded interview of a witness at trial, and refused to grant a one-week continuance; (2) the trial court erred by denying his new trial motion; (3) admission of Thompson's testimony violated his due process rights; and (4) the trial court erred by instructing the jury with CALJIC No. 2.03. He joins in Buford's arguments.

### **FACTS AND PROCEDURAL HISTORY**

#### **The crime scene**

At 2:00 a.m. on December 16, 2004, Los Angeles County Sheriff's Department deputies responded to a 911 call and found Augustin Juarez unconscious and lying face down in a pool of blood in an alley behind the Britisher Bar in Lancaster. Juarez was pronounced dead on arrival at the hospital from blunt force head trauma. Juarez had been severely beaten, sustaining fractures to his skull, nose, cheekbone, ribs and orbital bone of his left eye. He was bruised and had blood on his face, arms and body. Juarez's black

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

wallet was found near his body, with its contents strewn on the ground. An unopened pack of “GT One” cigarettes was recovered from the crime scene. On December 18, 2004, Buford’s GMC truck was found in a tow yard, and two unused cigarette filters of GT One cigarettes were recovered from it.

On the day before the murder, Los Angeles County Sheriff’s Department Detective Miguel Torres had encountered Juarez who appeared to be under the influence of alcohol. After determining that Juarez was not sufficiently intoxicated to be detained, Detective Torres returned Juarez’s cash-filled wallet to him. Detective Torres had to direct Juarez to a bus stop after Juarez asked occupants of a car for a ride by banging on their window with his wallet.

During his investigation of the crime scene, Los Angeles County Sheriff’s Department Deputy Dale Parisi found two transients, Harold Hill and Robin Nolan, sharing a sleeping bag in the dumpster area of the alley. Hill did not appear to be under the influence of drugs or alcohol. Hill told Deputy Parisi that he had heard people fighting and recognized one of the voices as that of Saco, whom he described as African-American, stocky, five feet eight or nine inches tall, and weighing 200 pounds. Hill stated that he was afraid of Saco. Nolan told Deputy Parisi that she had been asleep and had not seen or heard anything.

### **Hill’s interview and trial testimony**

Los Angeles County Sheriff’s Department Detective Joseph Romero interviewed Hill at 7:00 a.m. on December 16, 2004. Hill did not appear to be under the influence of drugs or alcohol. Hill told Detective Romero that he had been awakened by the sounds of someone being beaten in the alley. He heard Saco say “why are you with my girl?” “don’t you ever,” and “mother.” Hill described Saco as African-American and about five feet eight inches tall. Hill also heard someone moaning and crying out in pain and fear.

On July 26, 2007, Detective Romero and his partner Los Angeles County Sheriff’s Department Detective Joseph Martinez interviewed Hill while he was incarcerated for an unrelated crime. Hill’s recorded interview was played for the jury. During the interview,

Hill identified Buford as Saco from a photographic six-pack. Hill identified two photographs of Lakisha Bentley as Buford's girlfriend. Hill was unable to identify two photographs of Ward. He told the officers that he did not want to testify.

At trial, Hill testified that he was not sure whether the voice he heard arguing in the alley belonged to Saco. He also testified at trial that he did not know if Bentley was Saco's girlfriend. Hill also failed to identify anyone in the courtroom as Saco and did not recall telling detectives that he heard Saco say "don't you ever," and then "mother."

**Thompson's interview, statements prior to the preliminary hearing, and trial testimony**

On December 17, 2004, Detectives Romero and Martinez interviewed Thompson. They did not read Thompson her rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) because they did not suspect her of any crime. They did not threaten to charge her with murder or to keep her in jail if she did not "go along" with their version of the incident. Nor did they tell her that appellants had incriminated her. They began recording the interview after introducing themselves and telling her the purpose of the interview. Thompson did not appear to be under the influence of drugs during her interview.

Thompson told the officers that on December 15, 2004, Buford, Ward, and Shawn Lee (Thompson's boyfriend) met Thompson in an empty apartment on Beech Avenue where Thompson sometimes stayed. Thompson said Ward was bald but always wore a beanie. Appellants left. Thompson and Lee fought. Later that evening, Thompson and another prostitute, Lakisha Bentley, went to 10th Street and Avenue I to ply their trade. Thompson had a client around 10:00 p.m. Thompson then walked back to Avenue I and saw appellants. Around 11:00 p.m., she argued with Buford about money. Juarez approached Thompson and asked her to do something. Ward asked Thompson if the man had any money and Thompson told him that Juarez had enough money and that she was leaving with him. Thompson and Juarez walked to a bar. Appellants followed. Buford was "ranting and raving," and told Juarez to give him his money. Thompson and Juarez

walked to an alley, followed by appellants. Buford hit Juarez. Thompson tried to push Buford away and calm him down. In the dumpster area, Buford hit Juarez, who fell down. Buford continued to demand Juarez's money. Ward pushed Juarez to the ground. When Thompson told Juarez to run, he did and jumped over a gate. Appellants followed Juarez, hit him, and dragged him back over the gate and into the alley. Appellants hit Juarez in the head. Buford hit Juarez with something. Appellants continued to beat Juarez, stomp on him, and kick him. They slammed his head on the concrete. Thompson was frightened by the beating. When she saw a police car drive by she walked away from the alley and sat in a parking lot. Appellants ran to a parked car and drove away. Thompson thought that Lee was the driver.

Thompson went back to the apartment where she was later joined by Buford, Ward, and Lee who were very sweaty. Appellants and Lee had \$500 and split it among themselves. Buford was shirtless when he arrived. Appellants said their hands hurt.

During the interview, Thompson was shown a photograph of Juarez whom she identified as the victim. She began weeping when she saw the photograph.

Prior to the preliminary hearing on December 28, 2005, Detective Romero and the prosecutor met with Thompson who was in custody for drug possession. Thompson was upset, scared, and reluctant to testify. Thompson told them she had lied during her previous interview. The prosecutor did not disclose that information to the defense. The prosecutor gave Thompson use immunity prior to her testimony at the preliminary hearing.

At trial, Thompson recanted the statements she made in her interview. Thompson testified that she was arrested and interviewed on December 17, 2004 by two detectives who frightened her, told her that she was an accomplice to murder, and said that they "wanted" appellants. She stated that she was high on drugs when she was interviewed. She stated that prior to recording the interview, the detectives told her that Buford and Bentley had implicated Thompson. As a result, she became angry at Buford and decided to make up the story. The detectives also told her that Lee was involved.

Thompson testified that on December 15, 2004, she argued with Lee at the apartment on Beech Avenue. She walked to the house of a man named Ron, with whom she spent the evening. Thompson was not with appellants on December 16, 2004. She said the prosecutor and Detective Romero promised her that she would be released after testifying at the preliminary hearing. She testified that her preliminary hearing testimony was inconsistent with the statements she gave during her interview because she had forgotten many of the lies she told in the interview. Thompson denied telling Sabrina Rucker “they killed that Mexican.”

### **Bentley’s interviews and trial testimony**

On December 17, 2004, Detectives Romero and Martinez interviewed Buford’s girlfriend, Bentley, who had been too intoxicated to speak coherently to them the previous day. Bentley stated that on December 16, 2004, Ward told her that between 11:00 p.m. and midnight, Thompson “did the lick on” or robbed one of Thompson’s tricks in an alley on 10th Street and Avenue I. Thompson pretended that she would provide sex to the trick. Ward then approached them, accused the man of screwing around with his girl, beat him, and took the man’s money. On December 16, 2004, Ward was happy and laughing about having over \$100.

On January 4, 2005, Detectives Romero and Martinez again interviewed Bentley after she told them she had new information. She told the detectives that on December 15, 2004, Buford had a brand new pack of GT One cigarettes before he dropped her off. When she asked him for a cigarette in the early morning hours of December 16, 2004, Buford said he had lost his new pack.

At trial, Bentley recanted her statements, denying that she had told the detectives that Ward told her he had robbed and beaten one of Thompson’s tricks. Bentley testified that she was dating Buford in December 2004. Both Ward and Buford were bald. She stated that on December 15, 2004, she saw Thompson with a Mexican man. Around 10:00 p.m., Bentley got high with Thompson who told her that someone had been robbed in the alley behind the Britisher Bar. Bentley then left to turn a trick and later met Buford

at a liquor store. They went to take a shower at Rucker's apartment. She testified that it might have been Lee who told her that he had robbed the Mexican man. She stated that during her interview, the police told her Buford had accused her of murder. She also testified that the detectives told her that Ward had committed robbery. She testified that she told the detectives that Buford had been with her from 11:00 p.m. on the evening Juarez was killed until 11:00 a.m. the next day and that they never went to the Britisher Bar. Bentley denied telling the detectives that Buford had complained about losing a new pack of GT One cigarettes. She also denied telling the police that she saw Ward with a lot of money.

#### **Lee's interview**

On December 20, 2004, Detectives Romero and Martinez interviewed Lee who did not have any cuts, abrasions, or swelling on his hands. He wore corn rows.

#### **Buford's interview and trial testimony**

On December 17, 2004, after advising Buford of his *Miranda* rights, Detectives Romero and Martinez interviewed Buford. The detectives advised Buford that they were questioning him about a murder. They told him the date, time, and location of the murder. Buford never mentioned a man named Clyde Smith, but he repeatedly denied involvement in the murder. The detectives noticed that Buford's hands were swollen and that he was bald. Buford told the detectives that his hands were swollen because he was a street fighter. He then demonstrated his skills by punching a concrete wall. Buford told the detectives that he drove a grey GMC truck.

At trial, Buford admitted that his nickname was Saco. He denied that the officers had questioned him about the beating or murder of Juarez. He said they had information he had murdered someone, but they did not give him details or a date. He testified that he did not know about Juarez's murder until he had been in jail for two or three months. He stated that on the night of the murder he was with a man named Smith.

### **Ward's interview and trial testimony**

During his trial testimony, Ward acknowledged that he had told the police during an interview that his hands were swollen because a week before he was arrested he had punched a white man who had cursed at him and spit in his face.

### **Sabrina Rucker's interview and trial testimony**

On December 20, 2004, Detectives Romero and Martinez interviewed Rucker who told them that on December 15, 2004, at about 7:00 p.m., Buford asked her if he could take a shower in her apartment. On December 16, 2004, at 3:30 a.m., Buford came to her apartment to buy drugs, flashing a substantial amount of money. Buford was with Bentley and others. That same day, Thompson came to her apartment and spoke to her. Thompson was secretive and quiet.

At trial, Rucker testified that she lived in the Beech Avenue apartments. In December 2004, Buford bought drugs from her. Later that day he came back for more drugs and then asked her if he could take a shower. Rucker gave him soap and told him to take a shower in one of the apartments. Rucker denied telling police that Buford was flashing a large amount of money. Instead, she testified that he carried "some money." When she went to the apartment later, she saw Thompson and Bentley. Bentley was carrying a lot of cash. Earlier, Thompson had come to her saying that she wanted to tell her something. Thompson never told Rucker anything. Rucker denied telling the detectives that Thompson had said, "they killed that Mexican."

### **Nolan's interview and release from custody**

On December 16, 2004, Nolan told Detective Romero that on December 15, 2004, she could hear two men arguing while she was lying down in an alley with Hill. She could hear them "beating up on each other." She did not recognize the voices of the men, but stated that the person being assaulted wore a blue and white plaid shirt and the person committing the assault wore a black jacket and had short braids or sticks in his hair. She remembered Hill stating that Saco had just beaten somebody.



On April 10, 2008, Nolan was incarcerated on unrelated charges at the Lynwood station of the Los Angeles County jail. On that same day, the trial court issued a removal order for Nolan to appear in court. But instead, Nolan was released from custody at 6:30 p.m. on April 10, 2008. Buford's counsel represented that "Department 100" refused his earlier request to order Nolan out because she was scheduled to be released on May 15, 2008. The trial court found there was no evidence that the Los Angeles County Sheriff's Department's Century Station in Lynwood (Sheriff's Department) had disregarded the trial court's April 10, 2008 order. The trial court determined that the order was turned in on April 10, 2008, but that it was not known when the Sheriff's Department received the order.

During trial on April 21, 2008, Buford's counsel represented that his investigator had contacted Nolan's son, but had been unsuccessful in reaching Nolan. Counsel requested the trial court to obtain the prosecutor's assistance in reaching Nolan. The prosecutor said she would ask one of the investigators to contact Nolan, but Nolan was not found in time for trial.

During trial, on April 24, 2008, the trial court sustained the prosecutor's objection to Buford's counsel's attempt to question Detective Romero about Nolan's statement that one of the perpetrators had short braids. The trial court held a hearing on April 28, 2008 denying Buford's counsel's request to play Nolan's audiotaped interview and provide the jury with its transcript. The trial court also denied Buford's counsel's request for a one-week continuance to locate Nolan. On April 30, 2008, the trial court denied Buford and Ward's motion for mistrial, made on the basis that the Sheriff's Department violated appellants' due process rights by releasing Nolan.

The jury returned a verdict on May 5, 2008. On July 18, 2008, Buford's trial counsel filed a motion for new trial. Nolan failed to appear for the hearing that day as requested by Buford's trial counsel. The hearing on the motion was continued to August 22, 2008. On August 22, 2008, Nolan was present but the trial court declined to hear her testimony because the parties had stipulated to her testimony as contained in the

transcript of her fourth interview. The hearing was again continued and the trial court denied the motion on September 23, 2008.

## **DISCUSSION**

### **I. The trial court's failure to exclude Thompson's trial testimony did not violate appellants' due process rights**

Appellants contend that Thompson's incriminating statements against them were coerced by the police and the trial court should not have allowed the prosecution to impeach her trial testimony with her extrajudicial statements. We disagree.

"... [D]efendants must allege a violation of their *own* rights in order to have standing to argue that testimony of a third party should be excluded because it is coerced. It is settled that the accused has no standing to object to a violation of another's Fifth Amendment privilege against self-incrimination." (*People v. Badgett* (1995) 10 Cal.4th 330, 343.) "... [T]here is a significant difference in the burden of proof applicable to a claim under the Fifth Amendment and defendants' claim that the testimony of a third party is subject to exclusion as a matter of due process. The burden is on the People to demonstrate the voluntariness of a defendant's admissions or confessions by a preponderance of the evidence." (*Id.* at p. 348.) "By contrast, when a defendant makes a motion to exclude coerced testimony of a third party on due process grounds, the burden of proving improper coercion is upon the defendant." (*Ibid.*)

"The statement of a suspect or witness is coerced if it is the product of police conduct which overcomes the person's free will." (*People v. Lee* (2002) 95 Cal.App.4th 772, 782.) "California courts have long recognized it is sometimes necessary to use deception to get at the truth. [Footnote omitted.] Thus, the courts have held, a 'deception which produces a confession does not preclude admissibility of the confession *unless the deception is of such a nature to produce an untrue statement.*' [Footnote omitted.] It is also well established exhortations directed to the suspect or witness to 'tell the truth' are not objectionable. [Footnote omitted.] We apply these same rules to a statement by a witness." (*Id.* at p. 785.)

The reviewing court examines the entire record to make an independent determination of whether admission of coerced testimony of a third party deprived the defendant of a fair trial. (*People v. Badgett, supra*, 10 Cal.4th at p. 350.) “Our review of this record would normally resolve any factual conflicts in the evidence favorably to the judgment below.” (*Id.* at p. 352.) But, in determining whether a witness’s testimony was coerced, the reviewing court “defer[s] to the trial court’s credibility determinations, and to its findings of physical and chronological fact, insofar as they are supported by substantial evidence.” (*People v. Boyer* (2006) 38 Cal.4th 412, 444.)

Appellants urge that the trial court erred in failing to exclude Thompson’s statements because it considered only Thompson’s demeanor during the interview and disregarded the following: that the detectives told Thompson they had information implicating her in the murder, that they were considering charging her with murder, that Thompson did not incriminate appellants until after she was accused of being an accomplice to murder, that Thompson was interrogated without being given *Miranda* warnings, that Thompson recanted her statement, and that before the preliminary hearing Thompson told the detectives that she had lied.

The trial court noted that it had heard the testimony and viewed Thompson’s behavior during the tape. It concluded that Thompson did not appear lethargic or under the influence. It noted that she gave very specific details without hesitation, including telephone numbers, addresses, zip codes, her mother’s age, and described tattoos and facial hair on the appellants. She was also able to refer to a diagram regarding the location of individuals, businesses, trash cans, gates, dumpsters, and garages. The trial court also observed that Thompson became very remorseful and emotional when she was shown Juarez’s photograph, leading the trial court to conclude that she had indeed met Juarez. The trial court noted that even though the prosecutor should have informed the defense of Thompson’s statement prior to the preliminary hearing that she had lied during the interview, it found no prejudice because the defense was given the information prior to trial. Thus, contrary to appellants’ contention, the trial court considered other factors

besides Thompson's demeanor when it concluded that the officers did not engage in coercive or suggestive conduct.

Next, we are satisfied from our independent review of the evidence that the admission of Thompson's statements did not deprive appellants of a fair trial. Thompson's statement contained in the clerk's transcript discloses that after the detectives asked her preliminary questions about her name, address, and telephone numbers, they asked her what happened on the night of December 15, 2004. Thompson gave very specific details of her evening, step-by-step in a narrative form. Thompson provided times, dates, and physical descriptions of Ward, Buford and Juarez. She also described the location, the nearby businesses, the alley, and the dumpster. In fact, Thompson disagreed with Detective Romero's suggestion that appellants split the money with Lee because they were generous friends. Rather, she stated that she believed Lee was getting a cut. When Thompson was shown a photograph of the victim, she cried and became remorseful, which lends credibility to her statement that she had met Juarez. Only after Thompson had told the detectives about the murder and the gathering at the apartment, did the detectives advise her that appellants were in jail. In response to her question whether she would go to jail too, the detectives then pressed her to tell the truth, explaining that appellants would blame her for setting up the trick. Thompson stuck to her story, however, denying that she knew beforehand of any plan to help them. The trial court's finding that Thompson was a credible witness during her interview is supported by substantial evidence.

Detective Martinez testified that Thompson did not appear to be under the influence of drugs or alcohol during the interview, that he did not use any ruses during her interview, and that he did not tell her she would serve time in prison. He stated that neither he nor Detective Romero told Thompson to lie. Although the detectives told her they had information implicating her in the murder, they did not give Thompson the details she later told them during the interview.

We are satisfied that appellants have not carried their burden of showing that Thompson's statement was coerced.

## **II. Appellants' rights to compulsory process and due process were not violated**

Appellants contend that their rights to compulsory process and due process were violated when the Sheriff's Department released Nolan from custody despite a court order directing a deputy sheriff to bring her to court to testify. We disagree.

"A defendant's right to present a defense, including . . . the right to "offer the testimony of witnesses, and to compel their attendance, if necessary," is at the very heart of our criminal justice system." (*People v. Treadway* (2010) 182 Cal.App.4th 562, 567.) "In order to establish a violation of his constitutional compulsory-process right, a defendant must demonstrate misconduct. To do so, he is not required to show that the governmental agent involved acted in bad faith or with improper motives. [Citation.] Rather, he need show only that the agent engaged in activity that was wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify . . . .' [Citation.] [¶] To establish a violation, the defendant must also demonstrate interference, i.e., a causal link between the misconduct and his inability to present witnesses on his own behalf. To do so, he is not required to prove that the conduct under challenge was the 'direct or exclusive' cause. [Citation.] Rather, he need only show that the conduct was a substantial cause. [Citation.] The misconduct in question may be deemed a substantial cause when, for example, it carries significant coercive force [citation] and is soon followed by the witness's refusal to testify [Citation]. [¶] Finally, the defendant must also demonstrate 'materiality.' To carry his burden under federal law, 'he must at least make some plausible showing of how [the] testimony [of the witness] would have been both material and favorable to his defense.' [Citation.] Under California law he must show at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable. [Citation.]" (*In re Martin* (1987) 44 Cal.3d 1, 31–32.)

Appellants contend that the prosecutor knew that Nolan would provide exculpatory evidence, the loss of Nolan's exculpatory testimony was due to state action, Nolan's testimony was material, and bad faith of the Sheriff's Department need not be shown. We find that appellants were not deprived of their rights to compulsory process and due process. First, the trial court expressly found that there was no evidence that the Sheriff's Department deliberately disregarded its release order. Second, release of a material witness from custody is not misconduct because due process requires only that the police or prosecution refrain from conduct which makes unavailable the noninformant material witness whose testimony might conceivably be favorable to a defendant. (*People v. Hernandez* (1978) 84 Cal.App.3d 408, 411.) Once Nolan was released from custody, it was her own actions, not that of the Sheriff's Department or the prosecution team, that made her unavailable to the appellants. Nor is there any evidence that jail personnel knew Nolan was a possible material witness when she was released. Furthermore, neither appellant requested that Nolan be detained as a material witness pursuant to section 1332.

Even if we were to regard the Sheriff's Department's actions in releasing Nolan as misconduct, "misconduct by a government agent who has no involvement in the investigation or prosecution of the criminal charge against the defendant cannot automatically be imputed to the prosecution team for purposes of the Sixth Amendment." (*People v. Ervine* (2009) 47 Cal.4th 745, 767, 768 [Sacramento County Sheriff's Department was completely unrelated to the agency actually prosecuting defendant, the Lassen County District Attorney's Office].) That is, the Sheriff's Department was completely unrelated to the prosecution team, and their actions in releasing Nolan cannot be attributed to the prosecutor. (*Ibid.*; *People v. Jacinto* (2010) 49 Cal.4th 263, 270 [defendant was not deprived of his right to compulsory process where he was unable to show prosecutorial misconduct because the sheriff, who released the defendant to immigration officials who subsequently deported him, was not part of the prosecutor's team].)

We also find that the trial court did not err in failing to order the prosecutor to locate Nolan and produce her at trial. (*People v. Rance* (1980) 106 Cal.App.3d 245, 253, 254 [it is not the duty of the prosecution to produce or to keep track of witnesses the defendant may later wish to have testify].) Nor did the trial court abuse its discretion in refusing to allow the defense to play Nolan's audiotaped interview at trial. (*People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185 [trial court has discretion to fashion a remedy when the prosecutor's conduct has resulted in a loss of evidence favorable to the defense].) As previously stated, the prosecutor was not involved in any misconduct that resulted in the release of Nolan. Furthermore, as the trial court noted, the interview was unsworn testimony, not given under oath, and not subject to cross-examination.

Finally, the trial court did not abuse its discretion in denying Buford's request for a one-week continuance to locate Nolan. A trial court has wide discretion to grant or deny a defendant's request for a continuance. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "When a continuance is sought to secure the attendance of a witness, the defendant must establish 'he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation.] The court considers "not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" [Citation.]" (*Ibid.*)

The record shows that the trial court considered the timeliness of the request, the efforts made, and the burden on the jurors and the court in denying the motion. Buford attempted to locate Nolan from the day she was released from jail on April 10, 2008 to April 28, 2008, the day Buford requested the continuance. The trial court noted that the defense was close to resting its case, and the request could have been made at an earlier stage for the jury's convenience, balanced against the defense counsel's representation

that the defense investigator had exhausted all his leads in attempting to locate Nolan. Additionally, the record shows that the defense did not take advantage of the prosecutor's offer to have Detective Romero assist the defense in locating Nolan.

We are satisfied that appellants' rights to compulsory process and due process were not violated.

### **III. The trial court did not abuse its discretion in denying Buford's motion for new trial**

Appellants contend that the trial court abused its discretion when it denied Buford's motion for new trial. We disagree.

“““The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” [Citations.] “[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background.” [Citations.] [¶] In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: “1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.” [Citations.]” (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) “In addition, ‘the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.’” (*Id.* at p. 329.)

The issue on appeal is not whether the evidence was newly discovered, cumulative, or best evidence. Rather, the issue is whether the trial court abused its discretion in determining that Nolan's testimony would not render a different result probable on a retrial. We find that the trial court carefully considered the record in concluding that Nolan had given conflicting versions of what she saw and heard in the



alley on the night of the murder and determining that her testimony would not have rendered a different result on retrial. The record shows that Nolan's description of the assailant was equivocal and inconsistent. When she was initially interviewed by Deputy Parisi, she told him she had not heard or seen anything. During the December 16, 2004 interview with detectives Romero and Martinez, Nolan stated that it was dark but she could see the assailant hitting the victim. She said the assailant had dark hair, a dark face, no mustache, was neither fat nor skinny, and wore a leather jacket. She also stated he wore sticks in his hair or had short braided hair. When she was interviewed by a defense investigator in May 2008, Nolan stated that the assailant's hair was tightly curled to his head, about an inch long. She said he did not have braids or dreadlocks and that the assailant was very thin and stood about a head taller than the victim. She also said that Hill told her Saco was beating someone up.

We are satisfied that the trial court acted well within its discretion in determining that the proffered new testimony lacked credibility and implicitly finding that it would not have changed the result on retrial. (*People v. Delgado, supra*, 5 Cal.4th at p. 329 [trial court acted within discretion in finding proffered new testimony lacked credibility because witness's declaration in support of new trial motion was inconsistent with prior statements and testimony, other witness declarations, and with her demeanor as attested to by herself and by witnesses].)

#### **IV. Appellants' claim of instructional error is forfeited and any error was harmless**

Appellants contend that the trial court committed prejudicial error by instructing with CALJIC No. 2.03 without also giving the jury a limiting instruction indicating that CALJIC No. 2.03 only applied to Buford and not to Ward. We find that their claim of instructional error is forfeited and that in any event, any error was harmless.

CALJIC No. 2.03 provides: "If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance

tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

The record shows that both defense counsel argued against the applicability of CALJIC No. 2.03. Ward’s counsel in particular argued that the instruction did not apply to Ward because Ward’s statement that he had hit a white man was true. Ward’s counsel asked the trial court to take judicial notice that Ward had been convicted of crimes related to that incident days before the murder occurred, but did not request a limiting instruction when the trial court decided to give CALJIC No. 2.03. “Although the court must instruct the jury on the general principles of law applicable to a case, this obligation does not extend to instructions limiting the purposes for which particular evidence may be considered. [Citation.]” (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.) “Moreover, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate amplifying, clarifying, or limiting language.” (*Ibid.*) Counsel’s failure to request an instruction limiting its application to Ward therefore waived the issue on appeal.

In any event, there is no reasonable likelihood that the jury misapplied the law. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) CALJIC No. 2.03 requires the jury to find that the defendant made a willfully false or deliberately misleading statement concerning the crime before trial. If the jury had found that Ward made no willfully false statement, it would have concluded that CALJIC No. 2.03 did not apply to him. Furthermore, the jury was instructed with CALJIC No. 17.31, that not all instructions are necessarily applicable, and that the jury should disregard any instruction which applies to facts determined by the jury not to exist. We presume the jury followed the jury instructions. (*People v. Mills* (2010) 48 Cal.4th 158, 200–201.) Moreover, in light of the eyewitness testimony and circumstantial evidence implicating appellants, it is not reasonably probable that a more favorable result would have occurred had the instruction been limited to Ward. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

In light of the foregoing, we are satisfied that there was no cumulative error that deprived appellants of their right to due process.

**DISPOSITION**

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.

DOI TODD

We concur:

\_\_\_\_\_, P. J.

BOREN

\_\_\_\_\_, J.

ASHMANN-GERST